(4)

No. 90-5721

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

PERVIS TYRONE PAYNE,
Petitioner,

v.

TENNESSEE,
Respondent.

On Writ of Certiorari to the Supreme Court of Tennessee

JOINT APPENDIX

J. BROOKE LATHRAM
130 North Court Avenue
Memphis, Tennessee 38103
(901) 523-2811

Counsel for Petitioner

CHARLES W. BURSON
Attorney General & Reporter
450 James Robertson Parkway
Nashville, TN 37243-0485
(615) 741-6474
Counsel for Respondent

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CERTIORARI GRANTED FEBRUARY 15, 1991

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RELEVANT DOCKET ENTRIES

Date	Proceedings
September 1, 1987	Payne Indicted For the Murders of Charisse A. Christopher and Lacie Jo Christopher and For Making an Assault With a Knife Upon Nicholas A. Christopher With the Intent to Murder
February 9, 1988-February 16, 1988	Trial
April 16, 1990	Tennessee Supreme Court Affirmed Payne's Conviction and Sentence

IN THE CRIMINAL COURT OF TENNESSEE
AT MEMPHIS
30TH JUDICIAL DISTRICT

Cause No. 87-04408
87-04409
87-04410

TENNESSEE

v.

PERVIS TYRONE PAYNE

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* * * *

[1504] MARY ZVOLANEK,

called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. GARDNER:

Q. Would you tell us your name, please, ma'am?
A. Mary Zvolanek.
Q. Would you spell your last name for the court reporter?
A. Z-v-o-l-a-n-e-k.
Q. Ms. Zvolanek, how many children have you had?
A. Eight.
Q. And are you the mother of Charisse Christopher?
A. Yes, I was.
Q. Are you also the grandmother of Lacie Jo and Nicholas Christopher?
A. Yes.

Q. Ms. Zvolanek, how has the murder of Nicholas's mother and his sister affected him?
A. He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell [1505] him yes. He says, I'm worried about my Lacie.

MS. GARDNER: Thank you.
No further questions.
THE COURT: Do you have any questions?
MR. GARTS: No questions, Your Honor.
THE COURT: You may step down.

* * * *

PROSECUTION'S OPENING STATEMENT

SENTENCING STAGE

MR. HENDERSON: Ladies and gentlemen, this is the stage of the trial that I asked you a lot of questions about during voir dire, and I'm sure you all have even more questions than I asked about what happens now. At this stage of the trial both sides are allowed to introduce any further evidence concerning what are called and aggravating and mitigating factors. The aggravating factors are listed in the statute. The Judge will tell you, I believe, about four or five particular aggravating circumstances that are raised by the facts in this case or the evidence in this case.

The State expects to prove or has—expect we have proven several of them already. You will, of course, consider all of the evidence that you heard in the first part of the trial during the second part of the trial. We expect this part of the trial to be much briefer than the first part of the trial, of course, since most of the evidence on sentencing has already been introduced on both sides, although you will hear some additional proof.

The aggravating factors the State expects to ask you to find at the end of the penalty phase and we expect to have already proven and show you some additional proof is one at least as to Lacie Jo one of the aggravating factors set out by our Legislature as a grounds for ordering the death penalty is that the victim was under the age of twelve years old. And officer as to Lacie, she was only two years old. So we expect that aggravating circumstance has been proven beyond a reasonable doubt and to a moral certainty, and it's really not contested.

Another aggravating factor that we expect the proof to have shown and to continue to show during this stage of the trial is that the defendant caused the risk of death to two or more persons other than the person murdered. And of course, in this case there were three people there. At the time that he murdered Charisse he not only caused

a risk of death or serious bodily harm—or death to others but did cause death to one other and was serious risk of death to one other one as well as the one other one he killed. So that one we expect to be proven, and basically has been proven and there's not much contradiction of that.

The third one we expect to show you some more proof on and we expect already has been proven is that the murder was heinous, atrocious, and cruel. In this case we expect to show you a little more proof as to exactly how heinous, atrocious, and cruel this killing was. And we submit that at the end of this case, end of this phase of the trial, you will find that factor too has been found beyond a reasonable doubt and to a moral certainty.

At the next stage of the trial we plan on offering probably just two witnesses, one of them is Mary Zvolanek. She will tell you something about the heinous, atrocious, and cruel nature of what happened and its effect on Nicholas. And then we're going to show you about two minutes, roughly, of a color videotape of the crime scene which will show you in much more detail and much more accurately the nature of the attack on the two victims of the murder in the first degree indictments. We submit that proof will show you beyond any doubt that this was a heinous, atrocious, and cruel murder.

Thank you.

* * * *

PROSECUTION'S CLOSING ARGUMENT

SENTENCING PHASE

[1571] THE COURT: Okay. I think now we're ready for the next stage of this hearing which would be the closing statements of the attorneys.

MR. HENDERSON: Ladies and gentlemen, we're at the stage of the trial that I talked to you about back—[1572] seems like a couple of weeks ago, but it's only a week ago from tomorrow when we started. This is the phase where you all will determine punishment. When I get through speaking Mr. Garts will get up and make his plea, and then Ms. Gardner will get up to rebut some of the things he says, and the Judge again will give you the instructions on the law. And you all again will go back to deliberate and reach your unanimous verdict. You will return that verdict here in open Court, and the case of *State of Tennessee v. Pervis Tyrone Payne* will be over. After about a week.

What you will hear in this part of the trial will be somewhat different as far as the law goes than what you heard in the first part of the trial. It will be much shorter since there is only one real issue, and that's the difference between life and death. The procedure, although it sounds a little complicated, is not really all that cumbersome. I believe the Judge will tell you that in order to sentence someone to death by electrocution in this state, you must find one or more of what are called aggravating circumstances.

In this case, I submit to you, you're going to find that the aggravating circumstances are relatively easy to follow, at least three of them are. One of them being, of course, that the murder was committed against a [1573] person less than twelve years of age and the defendant was eighteen years of age or older. That's virtually uncontradicted and uncontroverted in this case. There is absolutely no question about it, that Lacie Jo was under

twelve, she was two. There's absolutely no question that the defendant is over eighteen. He's twenty. That one has been established beyond any shadow of a doubt, even though that is not the burden of proof.

The other one is that the defendant knowingly created a great risk of death to two or more persons other than the victim murdered during his act of murder. At the time he murdered Charisse Christopher did he cause a risk of death to two or more other than Charisse? In this case, again, there can be no doubt, there were two other people in there stabbed, one to death and the other one virtually to death. Aggravating circumstance No. 2 has been established.

And the third, the murder was especially heinous, atrocious, or cruel, in that it involved torture of depravity of mind. That one at least has somewhat more subjective words in it, not as concrete as figuring out how old someone is or counting up the number of bodies littering a kitchen floor. But whether or not it was especially heinous, atrocious or cruel, and that it involved torture or depravity of mind. In order to [1574] determine whether or not that aggravating circumstance exists, you have to again think about the evidence that you all have considered so far about—not in this case so much who did it but how did it happen, as far as we can reconstruct from the evidence in the case. How did it happen. Not why or who at this stage, but how did it happen. Is it heinous, atrocious, or cruel and did it involve depravity of mind?

You all have seen the picture in Exhibit No. 22 which gave you some indication of how violent the attack was, how heinous the attack was, how atrocious, and a lot of these mean basically the same. But I think you will agree that they don't have the impact of that two minutes of videotape that you saw. Now, the two minutes of videotape wasn't just shown because it's in color and looks a whole lot more gory. It's because it shows more detail and more accurately what we were talking about in the

first stage of the trial. And while, perhaps, I couldn't refer to it in voir dire, you remember when I asked you in voir dire could you listen to that kind of proof, that you were going to see and hear some rather graphic evidence of wounds. Well, that's what I was talking about, the videotape.

You see, because that's not something I want to spring on somebody without warning them on the front end, [1575] even though it was a week ago. Because it shows very graphically how atrocious this crime was, how cruel it was, and how much depravity it showed. Some of the details especially in that picture—in that videotape, you can't see as well in the black and white picture. For instance, Charisse's right hand all knarled up in agony. And Lacie Jo's hand and Lacie Jo's eyes and the expression on her face some people refer to as the thousand yard stare because it's just sort of not focused.

We know that three people were stabbed, two of them to death and the third one virtually to death. The doctors cannot tell us who died first. They cannot tell us exactly in what order they died or exactly when they died. But we know from their testimony that Charisse, for instance, did not die immediately. This wasn't simply one gunshot wound to the head. It wasn't even one simple stab wound to the heart. You heard the doctor, it took all of them to kill her and it took some time to kill her.

Lacie Jo, perhaphs, was the closest to going quickly, although hers, again, was by bleeding to death internally. It was the result of multiple stab wounds, the major one being the one that clipped the aorta.

We don't know which one saw the other one die because we don't know which one died first. We don't know which one he killed first. We don't know which one lost [1576] consciousness first. But they didn't happen at the same time. One of them saw the other one die. I don't know which is easier.

Whether Charisse saw her children stabbed or not, we will never know. Or Lucie saw her mother stabbed, we will never know. Either way, is there anything more depraved? Is there anything more heinous? Is there anything more atrocious? Is there anything more cruel? Either a mother or baby seeing the other one stabbed to death?

But we do know that Nicholas was alive. And Nicholas was in the same room. Nicholas was still conscious. His eyes were open. He responded to the paramedics. He was able to follow their directions. He was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and to his baby sister.

Is that heinous? Is that atrocious? Is it cruel? Can you think of anything more torturous than that? Is there anything more outrageous than that? The imagination cannot even think of anything worse than that.

If there has ever been a case of heinous, atrocious, cruel, and depraved murder, this has to be it. If this isn't it, there is no such thing. It can't be if this is not it. [1577] So those three aggravating circumstances, I submit to you, have been proven beyond a reasonable doubt and to a moral certainty. So then what do you do? You weigh it against the mitigating circumstances. This is not one of those situations where it's so easy to say you put them in scales and you weigh one side or the other. How do you weigh things like what you saw on the videotape? They don't weigh in ounces. They don't weigh in pounds.

This is something that has to go on—I was going to say in your own minds--but weighing aggravation and mitigation I'm not sure takes place in the mind. May be something that you have to weigh in your heart. But the Judge, I believe, will tell you that if you find there are aggravating circumstances, you must weigh them against the mitigating circumstances. The Court will tell you to

determine whether or not the aggravating circumstances are outweighed by the mitigating circumstances, and whether or not there are any mitigating circumstances that substantially outweigh the aggravating circumstances.

What are the mitigating circumstances? The mitigating circumstances as presented are that the defendant was a good worker with his father. He was not any trouble to his father or his mother. That could probably be said hopefully about most people. But keep in [1578] mind you may have seen something that even his parents didn't see. You are not to decide this case as his parents. You are to decide it as jurors of this community.

You may have seen something that either his parents did not see because he hid it from them or because as all parents do, you don't want to see it. But I submit to you that you have seen something different than what they saw. You saw a man who sat in this chair after taking an oath before God look at you all and lie. You saw a man who could do this. And could sit up there and not show remorse at all. You saw something that a parent could never see because a parent will never allow themselves to see that, and I don't blame them. I have children, I wouldn't believe it.

But you all are not here as his parents. You are here as jurors and citizens of the community with a social responsibility. You heard the testimony about him riding around, having a few beers and a little cocaine apparently, reading Playboy or whatever that magazine was. Dating a married woman is neither here nor there but it's things that his parents did not approve of. Things that his girlfriend did not approve of. Even she did not allow alcohol, let alone drugs, yet, he would do it and do it at her apartment. Would use cocaine, but of course he's not [1579] going to let his parents and/or his girlfriend know about that. There's a side to him that they have not seen, but you have seen it. You have seen it in this

courtroom. And you heard it as he described how she hit the wall.

That's the sort of thing you have got to weigh in this case, those mitigating circumstances against those aggravating circumstances. It's not you count up we've got three aggravating and they've got mitigation and therefore it's three to two or something like that. It's the sort of thing you've got to weigh in here. And you've got to decide this as citizens and as jurors. Because we all have a social obligation. Every indictment in the State of Tennessee that is ever returned ends with the same words, that is, that the offense was committed against the peace and dignity of the State of Tennessee. Every indictment, including the three indictments here. Because under our state law we guarantee every citizen peace and dignity. We fail miserably at it. We guarantee them peace and dignity, but we fail miserably at it. Because people do get killed. Because crime does occur.

But we're asking you as citizens of this county and of this state to do the best you can to make good on the guarantee that's contained actually in our State Constitution. And that is everyone is entitled to the peace and dignity of the State of Tennessee, including [1580] Charisse, Lacie, and Nicholas.

Because what you can accomplish by sentencing the defendant to death by electrocution may be more important than just this case. What are the reasons for sentencing someone to death by electrocution? Well, one of them is hopefully to deter others. Explain this is what happens if you do wrong, if you go out and get drunk and start using cocaine and get into trouble and give way to your darker desires, this is what happens so don't do that. You can argue about whether or not that works or not.

Another way is—another means of doing this is just out of trying to deter this particular defendant. We know if we sentence him to death by electrocution he will never do anything wrong again. At least we hope not. If he is

sentenced to death by electrocution, this will stop him from doing it again, and that is a valid reason for the death penalty.

But there is another reason as well. I don't really know what word to put on it. Other than it just seems right sometimes if someone can do something this bad, can take someone else's life like this, there is something inside the human soul that says it's just not right that he keeps living after what he did. And that's why I say when you go to weigh aggravation and mitigation, [1581] weigh it in here. Because that's where your sense of right and wrong is. Your sense of right and wrong is what tells you that this is wrong and it ought not to happen to anybody. And anybody who does that doesn't deserve to live. It's not right. It's not fair.

There is nothing you can do to ease the pain of any of the families involved in this case. There is nothing you can do to ease the pain of Bernice or Carl Payne, and that's a tragedy. There is nothing you can do basically to ease the pain of Mr. and Mrs. Zvolanek, and that's a tragedy. They will have to live with it the rest of their lives. There obviously is nothing you can do for Charisse or Lacie Jo. But there is something you can do for Nicholas.

Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict you will provide the answer.

Thank you.

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PROSECUTION'S REBUTTAL ARGUMENT

SENTENCING PHASE

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[1590] MS. GARDNER: Ladies and gentlemen, this will [1591] be the last thing that any of the lawyers will have an opportunity to say to you. Just as in the previous portion of the trial, the State has the burden of proof. That's the reason I am talking to you last.

I don't doubt Mr. Garts' sincerity. Yes, he is here on the behalf of Pervis Payne. Mr. Henderson and I are here on behalf of two people who were unable to come into this courtroom today and, yes, we are here on their behalf, as well as the rest of the people in the State of Tennessee. Charisse Christopher and Lacie Jo Christopher and Nicholas Christopher didn't have anybody in their kitchen on June the 27th to fight for them. They could have used somebody there. They could have used somebody to fight for them then, maybe to have spared their lives. They didn't have it. It was just Pervis Payne and his big knife as he murdered the mother, and he murdered the little baby girl, and he tried to murder the little boy.

You saw the videotape this morning. You saw what Nicholas Christopher will carry in his mind forever. When you talk about cruel, when you talk about atrocious, and when you talk about heinous, that picture will always come into your mind, probably throughout the rest of your lives. And I couldn't agree with Tom Henderson more, if this isn't a case for death by electrocution, then I don't know what is. Because that has to be the cruelest sight [1592] you will ever see.

This was not something some people came in from Hollywood and designed to try to offend you, to try to scare you, to try to shock you because you go to a movie to see something. Ladies and gentlemen, this was real

life that was taken, taken by Pervis Payne, Pervis Payne with his knife on June 27, 1987.

When you look around and when you go back to the jury room and you deliberate, and you try to weigh the aggravating circumstances, I want you to think about that tape. That videotape sizes it up. I want you to think about the two-year-old, little Lacie, and think about the close-up as it panned in on her back. A two-year-old child with stab wounds, six of the nine or the ten in her back. A child who never had a chance.

Mr. Garts talks about Pervis Payne and how well thought of he was in high school and how many people like him and love him. No one will ever know about Lacie Jo because she never had the chance to grow up. Her life was taken from her at the age of two years old. So, no there won't be a high school principal to talk about Lacie Jo Christopher, and there won't be anybody to take her to her high school prom. And there won't be anybody there—there won't be her mother there or Nicholas' mother there to kiss him at night. His mother will never kiss him [1593] goodnight or pat him as he goes off to bed, or hold him and sing him a lullaby.

Mr. Garts says give compassion, think about Pervis Payne. He's sitting here for you to look at. Charisse Christopher and Lacie Jo are not. This is where they were and this is how they said goodbye to life.

And why? Through anything that they did? Through anything that they deserved? That they asked for?

No. Because for whatever reason, whether it was for drugs or whether it was just because Pervis Payne felt like doing it that day, we know he did it. And not only did he do it, he did it over and over and over again with that knife. Not just once, not just an accident, but forty-one times into this young woman who had her whole life ahead of her, and her baby, right here, with the defendant's hat that she caught on her arm and that she drew her last breath with his hat under her arm.

Talk about what is an appropriate punishment. The law has set out what the appropriate punishment is in a case such as this and the aggravating circumstances. And I want to go through them one more time for you. I want you to think through them and to feel through them. Lacie Jo was two years old. The law says that if a victim is under the age of twelve years old and the defendant is [1594] over the age of eighteen, there's no question. That is uncontroverted. That is a given.

The second fact. That the defendant caused death or great bodily harm, the risk of it, to two or more people. Who were those people? Charisse Christopher was murdered. Lacie was murdered. And Nicholas came this close, but for excellent medical attention and people who thought fast and moved—seconds counted, and that's the reason Nicholas is an assault to murder victim and not for murder. So those two are beyond a shadow of a doubt, the Perry Mason statement, far beyond what the State even has to prove to you.

But I submit the one that is so overpowering and that you have seen probably in a way you will never forget is the videotape of that crime scene and of what Pervis Payne did to that family. He took them from a happy, normal, loving family to a bloody massacre, and left them for dead on June the 27th. It has to be the most heinous, the most atrocious, the cruelest thing you will ever witness. And you have witnessed it, you have seen it just as he saw it when he closed that door, with the exception of on that day Nicholas was lying there conscious in his blood. That's what we're dealing with.

Mr. Garts wants you to think about a good reputation, people who love the defendant and things about [1595] him. He doesn't want you to think about the people who love Charisse Christopher, her mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch

cartoons with him, a little one. These are the things that go into why is it especially cruel, heinous, and atrocious, the burden that that child will carry forever.

Mr. Garts has said that he is fighting for Pervis' life and he is fighting by himself. You have seen the type of job he has done in this case. No one could have any complaints of that. And you've heard him ask virtually every witness up here about have you talked with my investigators, the two people he has had a full command of that. He asked you not to have sympathy but by the same token, he asked you about that, not to hold it against him because he's been by himself or because of this or because of that. Well, I ask you to weigh this case just as you said you would during the voir dire and if you will remember the promise that you made.

There were numerous questions about if you get to the point where the State proves its case to you beyond a reasonable doubt and to a moral certainty, and if we get to the sentencing phase, can you weigh the aggravating [1596] circumstances. Not turn away from them but have the courage to look at them, and to weigh them against the mitigating circumstances. And if you find that they outweigh the mitigating circumstances, you can impose the sentence of death by electrocution. One that is fitting, one that is right, and one that suits the crime. One not to be taken lightly, but one to be imposed when the crime fits. And I submit to you that there has never been a case which it fit as this one and you've seen it.

Mr. Garts would like to blame this entire ordeal on Barry Wiggins. I think you can see beyond that. Barry Wiggins was not with Pervis Payne at the time of this massacre. Pervis Payne was all by himself with the Christopher family. As far as we know, from what we have head in this record, there is nothing wrong with Barry Wiggins. So, to blame Barry Wiggins and to say he's the reason Pervis Payne did wrong, that's just not what the facts show. And I think you know it.

Mr. Garts wants you to turn the defendant over to the Department of Corrections. That's what he urges you to do. The State is urging you to impose a sentence of death by electrocution.

Mr. Garts says but Pervis Payne has lived an exemplary life for twenty years. Well, what about Charisse, for twenty-eight years? What about Lacie Jo, [1597] for two years? They lived exemplary lives. But they are not here with us anymore. This is a situation where you have to weigh what has happened.

Ladies and gentlemen of the jury, this is the last thing I am going to say to you. But I want you to think about this when you go back into your jury room. We have heard a lot about Charisse Christopher, Lacie Jo and Nicholas, and here they were as they appeared before Pervis Payne came into their lives. And this is what he did to them.

Did they deserve it? Are you going to let it go unpunished?

I submit you can't do that. We ask you to impose a sentence of death by electrocution.

Thank you.

THE COURT: Ladies and gentlemen, I'll now give you the instructions as to the law for the sentencing phase of this trial, the sentencing phase of murder in the first degree.

* * * *

IN THE CRIMINAL COURT OF TENNESSEE
AT MEMPHIS
30TH JUDICIAL DISTRICT

(Caption Omitted in Printing)

SENTENCING PHASE—MURDER FIRST DEGREE

Ladies and Gentlemen of the Jury, you have now found the defendant guilty beyond a reasonable doubt of Murder in the First Degree as charged in the indictment.

It is now your duty to determine within the limits prescribed by law, the penalty which shall be imposed as punishment for this offense. Tennessee Code Annotated § 39-2-202(b), provides that a person convicted of Murder in the First Degree shall be punished by death or by imprisonment for life.

In arriving at this determination, you are authorized to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances which may have been raised by the evidence throughout the entire course of this trial, including the guilt finding phase or the sentencing phase or both. The Jury are the sole judges of the facts, and of the law as it applies to the facts in the case. In making up your verdict, you are to consider the law in connection with the facts; but the Court is the proper source from which you are to get the law. In other words, you are the judges of the law as well as the facts under the direction of the Court.

The burden of proof is upon the State to prove any statutory aggravating circumstance or circumstances beyond a reasonable doubt to a moral certainty.

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily upon the certainty of your verdict. Reasonable doubt does not

mean a doubt that may arise from possibility. Absolute certainty is not demanded by the law but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the verdict. The law makes you, the Jury, the sole and exclusive judges of the credibility of the witnesses and the weight to be given to the evidence.

Tennessee Code Annotated § 39-2-203(i) provides that no death penalty shall be imposed by a Jury but upon a unanimous finding of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:

1. The murder was committed against a person less than twelve years of age and the defendant was eighteen years of age or older.

2. The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder.

3. The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

"Heinous"

means grossly wicked or reprehensible; abominable; odious; vile.

"Atrocious"

means extremely evil or cruel; monstrous; exceptionally bad; abominable.

"Cruel"

means disposed to inflict pain or suffering; causing suffering; painful.

"Torture"

means the infliction of severe physical pain as a means of punishment or coercion; the

experience of this; mental anuish; any method or thing that causes such pain or anguish; to inflict with great physical or mental pain.

"Depravity"

means moral corruption; wicked or perverse act.

4. The murder was committed for the purpose of avoiding, interferring with, or preventing a lawful arrest or prosecution of the defendant or another.

5. The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.

Tennessee Code Annotated, § 39-2-203(j), provides that in arriving at the punishment, the Jury shall consider as heretofore indicated, any mitigating circumstances which shall include but not be limited to the following:

1. The defendant has no significant history of prior criminal activity;

2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

3. The victim was a participant in the defendant's conduct or consented to the act;

4. The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;

5. The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

6. The defendant acted under extreme duress or under the substantial domination of another person;

7. The youth or advanced age of the defendant at the time of the crime;

8. The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

If you unanimously determine that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the State, beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. The Jury shall state in writing the statutory aggravating circumstance or statutory aggravating circumstances so found, and signify in writing that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found.

You will write your findings and verdict upon the enclosed form attached hereto and made a part of this charge. Your verdict should be as follows:

(1) We, the Jury, unanimously find the following listed statutory aggravating circumstance or circumstances; (The Jury will then list the statutory aggravating circumstance or circumstances so found beyond a reasonable doubt.)

(2) We, the Jury, unanimously find that there are no mitigating circumstances sufficiently substan-

tial to outweigh the statutory aggravating circumstance or circumstances so listed above.

(3) Therefore, we, the Jury, unanimously find that the punishment shall be death.

The verdict must be unanimous and each Juror must sign their name beneath the verdict.

If you unanimously determine that no statutory aggravating circumstance has been proved by the State beyond a reasonable doubt; or if the Jury unanimously determined that a statutory aggravating circumstance or circumstances have been proved by the State beyond a reasonable doubt; but that said statutory aggravating circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. You will write your verdict upon the enclosed form attached hereto and made a part of this charge.

The verdict should be as follows:

"We, the Jury, unanimously find that the punishment shall be life imprisonment."

The verdict must be unanimous and signed by each juror.

The Jury in no case, should have any sympathy or prejudice or allow anything but the law and evidence to have any influence upon them in determining their verdict. They should render their verdict with absolute fairness and impartiality as they think truth and justice dictate. Take the case, consider all the evidence fairly and impartially and report your verdict to the Court.

/s/ Bernie Weinman
Judge

For indictment #87-04409:

PUNISHMENT OF DEATH

(1) We, the Jury, unanimously find the following listed statutory aggravating circumstance or circumstances:

(Here list the statutory aggravating circumstance or circumstances so found, which shall be limited to those enumerated by the Court for your consideration.)

1. The murder was committed against a person less than twelve years of age and the defendant was eighteen years of age or older.
2. The defendant knowingly created a great risk of death to two or more persons other than the victim murdered during his act of murder.
3. The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

(2) We, the Jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstances or circumstances so listed above.

(3) Therefore, we, the Jury, unanimously find that the punishment for the defendant, Pervis Tyrone Payne shall be death.

/s/ Frank T. Bartozzi
Jury Foreman

/s/ Louise Jones
Juror

/s/ Joe B. Key
Juror

/s/ Cathleen S. Hamilton
Juror

/s/ Brenda R. Hale
Juror

/s/ William J. Walker
Juror

/s/ Susan L. Daniels
Juror

/s/ Rickey Taylor
Juror

/s/ Forestine Traylor
Juror

/s/ Randal G. Powell
Juror

/s/ Katy L. Yarbrough
Juror

/s/ Frank Fluker
Juror

SUPREME COURT OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE,
Appellee,

v.

PERVIS TYRONE PAYNE,
Appellant.

April 16, 1990

OPINION

FONES, Justice.

Defendant was found guilty of first degree murder of Charisse Christopher and her daughter, Lacie, and guilty of assault with intent to commit murder in the first degree of her son, Nicholas. He was given the death penalty for each of the murders and thirty (30) years for the assault with intent to commit murder offense.

Charisse Christopher was 28 years old, divorced, and lived in Hiwassee Apartments, in Millington, Tennessee, with her two children, three and one-half year old Nicholas and two and one-half year old Lacie. The building in which she lived contained four units, two downstairs and two upstairs. The resident manager, Nancy Wilson, lived in the downstairs unit immediately below the Christophers. Defendant's girlfriend, Bobbie Thomas, lived in the other upstairs unit. The inside entrance doors of the Christopher and Thomas apartments were separated by a narrow hallway. Each of the upstairs apartments had back doors in the kitchen that led to an open porch over-

looking the back yard. In the center of the porch was a metal stairway leading to the ground. There was also an inside stairway leading to the ground floor hallway and front entrance to the four-unit building.

Bobbie Thomas had spent the week visiting her mother in Arkansas but was expected to return on Saturday, 27 June 1987, and she and Defendant had planned to spend the weekend together. Prior to 3:00 p.m. on that date, Defendant had visited the Thomas apartment several times and found no one at home. On one visit he left his overnight bag, containing clothing, etc., for his weekend stay, in the hallway, near the entrance to the Thomas apartment. With the bag were three cans of Colt 45 malt liquor.

Nancy Wilson was resting in her apartment when she first heard screaming, yelling and running in the Christopher aparament above her. She heard a door banging open and shut and Charisse screaming, "get out, get out." She said it wasn't as though she was telling the intruder to get out, it was like "children, get out." The commotion began about 3:10 p.m., subsided momentarily, then began again and became "terribly loud, horribly loud." She went to the back door of her apartment, went outside and started to go to the Christopher apartment to investigate, but decided against that, and returned to her apartment and immediately called the police. She testified that she told the police she had heard blood curdling screams from the upstairs apartment and that she could not handle the situation. The dispatcher testified he received her disturbance call at 3:23 p.m. and immediately dispatched a squad car to the Hiwassee Apartments. Mrs. Wilson went to her bathroom after calling the police. The shouting, screaming and running upstairs had stopped, but she heard footsteps go into the upstairs bath, the faucet turned on and the sound of someone washing up. Then she heard someone walk across the floor to the door of the Christopher apartment, slam the door shut and run down the steps, just as the police arrived.

Officer C.E. Owen, of the Millington Police Department, was the first officer to arrive at the Hiwassee Apartments. He was alone in a squad car when the disturbance call was assigned to Officers Beck and Brawell. Owen was only two minutes away from the Hiwassee Apartments so he decided to back them up. He parked and walked toward the front entrance. As he did so he saw through a large picture window that a black man was standing on the second floor landing of the stairwell. Owen saw him bend over and pick up an object and come down the stairs and out the front door of the building. He was carrying the overnight bag and a pair of tennis shoes. Owen testified that he was wearing a white shirt and dark colored pants and had "blood all over him. It looked like he was sweating blood." Owen assumed that a domestic fight had taken place and that the blood was that of the person he was confronting. Owen asked, "[H]ow are you doing?" Defendant responded, "I'm the complainant." Owen then asked, "What's going on up there?" At that point Defendant struck Owen with the overnight bag, dropped his tennis shoes and started running west on Biloxi Street. Owen pursued him but Defendant outdistanced him and disappeared into another apartment complex.

Owen called for help on his walkie-talkie and Officer Boyd responded. By that time Owen had decided Defendant was not hurt and the blood was not his own—he was running too fast. Owen told Boyd that "there's something wrong at that apartment." They returned to 4516 Biloxi. Nancy Wilson had a master key and let them in the locked Christopher apartment. As soon as the door was opened they saw blood on the walls, floor—everywhere. The three bodies were on the floor of the kitchen. Boyd discovered that the boy was still breathing and called for an ambulance and reported their findings to the chief of police and the detective division. A Medic Ambulance arrived, quickly confirmed that Charisse and Lacie were dead, and departed with Nicholas.

He was taken to Le Bonheur Children's Hospital in Memphis and was on the operating table there from 6:00 p.m. until 1:00 a.m., Sunday, 28 June. In addition to multiple lacerations, several stab wounds had gone completely through his body from front to back. One of those was in the middle of his abodmen. The surgeon, Dr. Sherman Hixson, testified that he had to repair and stop bleeding of the spleen, liver, large intestine, small intestine and the vena cava. During the surgery he was given 1700 cc's of blood by transfussion. Dr. Hixson estimated that his normal total blood volume should have been between 1200 and 1300 cc's. He was in intensive care for a period and had two other operations before he left the hospital, but he survived.

Charisse sustained forty-two (42) knife wounds and forty-two (42) defensive wounds on her arms and hands. The medical examiner testified that the forty-two (42) knife wounds represented forty-one (41) thrusts of the knife, "because there was one perforated wound to her left side that went through her—went through her side. In and out wounds produce two." He said no wound penetrated a very large vessel and the cause of death was bleeding from all of the wounds: there were thirteen (13) wounds "that were very serious and may have by themselves caused death. I can't be sure, but certainly the combination of all the wounds caused death." He testified that death probably occurred within, "maybe 30 minutes, that sort of time period," but that she would have been unconscious within a few minutes after the stabbing had finished.

The medical examiner testified that the cause of death of Lacie Christopher was multiple stab wounds to the chest, abdomen, back and head, a total of nine. One of the wounds cut the aorta and would have been rapidly fatal.

Defendant was located and arrested at a townhouse where a former girlfriend, Sharon Nathaniel, lived with

her sisters. Defendant had attempted to hide in the Nathaniel attic. When arrested he was wearing nothing but dark pants, no shirt, no shoes. As he descended the stairs from the attic he said to the officers, "Man, I ain't killed no woman." Officer Beck said that at the time of his arrest he had "a wild look about him. His pupils were contracted. He was foaming at the mouth, saliva. He appeared to be very nervous. He was breathing real rapid." A search of his pockets revealed a "pony pack" with white residue in it. A toxicologist testified that the white residue tested positive for cocaine. They also found on his person a B & D syringe wrapper and an orange cap from a hypodermic syringe. There was blood on his pants and on his body and he had three or four scratches across his chest. He was wearing a gold Helbrose wristwatch that had bloodstains on it. The weekend bag that he struck Officer Owen with was found in a dumpster in the area. It contained the bloody white shirt he was wearing when Owen saw him at the Hiwassee Apartments, a blue shirt and other shirts.

It was stipulated that Charisse and Lacie had Type O blood and that Nicholas and Defendant had Type A. A forensic serologist testified that Type O blood was found on Defendant's white shirt, blue shirt, tennis shoes and on the bag. Type A blood was found on the black pants Defendant was wearing when seen by Owen and when arrested. Defendant's baseball cap had a size adjustment strap in the back with a U-type opening to accommodate adjustments. That baseball cap was on Lacie's forearm —her hand and forearm sticking through the opening between the adjustment strap and the cap material. Three Colt 45 beer cans were found on a small table in the living room, two unopened, one opened but not empty, bearing Defendant's fingerprints, and a fourth empty beer can was on the landing outside the apartment door. Defendant was shown to have purchased Colt 45 beer earlier in the day. Defendant's fingerprints were also found on the telephone and counter in the kitchen.

Charisse's body was found on the kitchen floor on her back, her legs fully extended. The right side of her upper body was against the wall, and the outside of her right leg was almost against the back door that opened onto the back porch. Laura Picard was visiting her sister, Helen Truman, who lived in the downstairs apartment across from Nancy Wilson. She was sunbathing in the back yard and heard a noise like a person moaning coming from the Christopher apartment followed by the back door slamming three or four times, "but it didn't want to shut. And this hand, a dark-colored hand with a gold watch, kept trying to shut that back door." It was about that time that Nancy Wilson came out of her back door looking around. Mrs. Picard testified that she knew the manager was looking for the source of the noise and when Mrs. Wilson looked at her she pointed to the Christopher apartment. She said that it was just a few minutes later that the police arrived. She did not have a watch on at the time. She testified that the dark-colored hand she saw three or four times was at a level between the door knob and the bottom of the door.

The medical examiner testified that Charisse was menstruating and a specimen from her vagina tested positive for acid phosphatase. He said that result was consistent with the presence of semen, but not conclusive, absent sperm, and no sperm was found. A used tampon was found on the floor near her knee. The murder weapon, a bloody butcher knife, was found at the feet of Lacie, whose body was also on the kitchen floor near her mother. A kitchen drawer nearby was partially open.

Defendant testified. His defense was that he did not harm any of the Christophers; that he saw a black man descend the inside stairs, race by him and disappear out the front door of the building, as he returned to pick up his bag and beer before proceeding to his friend Sharon Nathaniel's to await the arrival of Bobby Thomas. He said that as the unidentified intruder bounded down the stairs, attired in a white tropical shirt

that was longer than his shorts, he dropped change and miscellaneous papers on the stairs which Defendant picked up and put in his pocket as he continued up the stairs to the second floor landing to retrieve his bag and beer. When he reached the landing he heard a baby crying and a faint call for help and saw the door was ajar. He said curiosity motivated him to enter the Christopher apartment and after saying he was "coming in" and "eased the door on back," he described what he saw and his first actions as follows:

> I saw the worst thing I ever saw in my life and like my breath just had—had tooken—just took out of me. You know, I didn't know what to do. And I put my hand over my mouth and walked up closer to it. And she was looking at me. She had the knife in her throat with her hand on the knife like she had been trying to get it out and her mouth was just moving but words had faded away. And I didn't know what to do. I was about ready to get sick, about ready to vomit. And so I ran closer—I saw a phone on the wall and I lift and got the phone on the wall. I said don't worry. I said don't worry. I'm going to get help. Don't worry. Don't worry. And I got ready to grab it—the phone but I didn't know no number to call. I didn't know nothing. I didn't know nothing about no number or—I just start trying to twist numbers. I didn't know nothing. And she was watching my movement in the kitchen, like she—I had saw her. It had been almost a year off and on in the back yard because her kids had played with Bobbie's kids. And I have seen her before. She looked at me like I know you, you know. And I didn't know what to do. I couldn't leave her. I couldn't leave her because she needed—she needed help. I was raised up to help and I had to help her.

He described how he pulled the knife out of her neck, almost vomited, then kneeled down by the baby girl, had

the feeling she was already dead; said the little boy was on his knees crying, he told him not to cry, he was going to get help. His explanation of the blood on his shirt, pants, tennis shoes, body, etc., was that when he pulled the knife out of her neck, "she reached up and grab me and hold me, like she was wanting me to help her . . .", that in walking and kneeling on the bloody floor and touching the two babies he got blood all over his clothes. He said he went to the kitchen sink, probably twice, to get water to drink when he thought he was going to vomit, but he denied that he went into the bathroom at any time or used the bathroom lavatory to wash up, as Nancy Wilson testified she heard someone do after the violence subsided.

He was then suddenly motivated to leave and seek help and he described his exit from the apartment as follows:

> And I left. My motivation was going and banging on some doors, just to knock on some doors and tell someone need help, somebody call somebody, call the ambulance, call somebody. And when I—as soon as I left out the door I saw a police car, and some other feeling just went all over me and just panicked, just like, oh, look at this. I'm coming out of here with blood on me and everything. It going to look like I done this crime.

The shoulder strap on the left shoulder of the blue shirt he was wearing while in the victim's apartment was torn, a fact he did not seem to realize and could not remember when it happened. He said he ran because the officer did not seem to believe him. He claimed that he had the Colt 45 beer with him as he ran; that the open can with beer in it spilled into the sack, as he ran from Owen, the bottom of the sack broke, the beer and tennis shoes were scattered along his route. He said that what witnesses had described as scratches were stretch marks from lifting weights.

Defendant presented five character witnesses who testified that Defendant's reputation for truth and veracity was good. Ruth Wakefield Bell testified that she had known Defendant all of his life. She was age 40 and lived in the same block on Biloxi as the Hiwassee Apartments, across the street. She said that on the Saturday afternoon of the murders, Defendant knocked on her door, identified himself and she looked out her bedroom window and saw him, but she did not let him in—she was upset with her boyfriend and did not want to see or "entertain" anyone. She denied that she was afraid to let him in—or that there was anything unusual about his appearance. She estimated that it was about twenty minutes after he knocked on her door that she saw police cars and an ambulance across the street. Defendant testified that he knocked on her door just before he decided to go to Sharon Nathaniels and went in the Hiwassee Apartments to pick up his bag and beer.

During the cross-examination of Defendant, he was asked and answered as follows:

> Q. Can you explain why there's bloodstains on your left leg?
>
> A. Left leg?
>
> Q. Yes, sir.
>
> A. Evidently it probably came—had to come from when she—when she hit the wall. When she reached up and grabbed me.
>
> Q. When she hit the wall?
>
> A. When she—when she hit—when she hit when I got ready to run up—when I got ready to vomit.
>
> Q. When she hit the wall she got blood on you?
>
> A. When she splashed. It was blood—a lot of blood on the floor.

Q. She got blood on you when she hit the wall. Is that what you said?

A. She hit against the wall when she fell back.

Q. Is that what you said, sir, that she got blood on you when she hit the wall?

A. I didn't say she got blood on me when she hit the wall.

Q. Isn't that what you said just a moment ago, sir?

A. That ain't—that's not what I said.

Blood was smeared on the wall of the kitchen next to the back door and on the door itself, from doorknob height to the floor and laterally approximately six or seven feet.

Defendant insists that the evidence is wholly circumstantial and is insufficient to support the verdict.

From the evidence in this case the jury could have found that Defendant was under the influence of cocaine or intoxicated from drinking beer and Geritol, both of which he admitted purchasing and drinking. He was unable to account for the expenditure of $30 to $50 of the sums that he withdrew from the bank on Friday and Saturday morning, and the State's theory was that he spent it for cocaine and used the syringe he purchased to administer it. Defendant and his friend Sylvester Robinson were cruising around the area looking at Playboy magazine containing sexually stimulating pictures and material. By 3:00 p.m. he had visited all the friends and acquaintances he had in the area, waiting for the return of Ms. Thomas, and the jury could have found that he decided to visit her next door neighbor to get a drink of water because he had obtained one earlier in the day from the Truman apartment, downstairs, or to use the telephone, etc. Once inside the evidence justifies the inferences that he made sexual advances, they were resisted and violence erupted. Obviously, Charisse fought her assailant with every ounce of resistance she could muster and tried to get out the back door, but the "dark colored hand" with a gold wrist watch on the arm prevented her from escaping. Her blood was smeared all over that door and the wall next to it. It is safe to conclude that she did not remove the tampon. There was no evidence that anything was missing from the Christopher apartment. So we may also conclude that robbery was not the objective of the murderer's presence.

The testimony of Laura Picard and Nancy Wilson, the time of Mrs. Wilson's call to the police and Officer Owens' arrival virtually foreclose the possibility that an unidentified intruder committed these murders and disappeared out the front door before Defendant entered the apartment. Defendant was the person that washed up in the upstairs bathroom, walked out of the apartment, locked the door, and encountered Officer Owen with his bag and beer. He was the person that Owen described as looking like "he was sweating blood." Also, the jury was justified in rejecting as unbelievable and contrary to human conduct and experience, his alleged efforts to render aid to the Christophers. We find the evidence sufficient to convince any rational trier of fact that Defendant was guilty of murder in the first degree beyond any reasonable doubt, in accord with the standards prescribed in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) and T.R.A.P. 13(e).

Next, Defendant insists that the trial judge erred in refusing to suppress evidence of his possession of illegal narcotics and drug paraphernalia, when the State had not complied with the discovery requirements of Tenn.R. Crim.P. 16.

Defendant filed pretrial motions for discovery and inspection and the production of exculpatory evidence. About a week and a half before 8 February 1988, the date of trial, the State learned from the Millington Police

Department of the availability of certain physical evidence--the hypodermic syringe wrapper, the paper with the cocaine residue, and the syringe cap taken from Defendant when he was arrested. This evidence had apparently been in the custody of the Millington police since June 1987. The State immediately informed defense counsel of this evidence, which both the State and defense counsel inspected for the first time on 3 February 1988. The next day Defendant moved for suppression of the evidence and on 5 February 1988, the paper with the residue was sent to the University of Tennessee for testing. That same day, after a hearing, the trial court refused to suppress the evidence because of its failure to be produced earlier. At the hearing, defense counsel expressly stated he did not want to run any independent tests.

Although Defendant argues that one could infer from certain omissions by the Millington police that the police were deliberately covering up this evidence because it was mitigating, there is no indication that the State or the police were acting in bad faith or in intentional disregard of the rules of discovery. Where there has been non-compliance with Rule 16, the trial court has discretion to fashion a remedy based upon the circumstances of the case. *State v. Cadle*, 634 S.W.2d 623, 625 (Tenn. Crim.App.1982). Evidence should not be excluded for non-compliance except when it is shown that Defendant is actually prejudiced by the State's failure and the prejudice cannot otherwise be eradicated. *State v. James*, 688 S.W.2d 463, 466 (Tenn.Crim.App.1984). In light of defense counsel's knowledge of and inspection of the evidence almost a week before trial and his statement that he was ready for trial and did not want a continuance, the trial court's refusal to exclude the evidence for any violation of Rule 16 was not error.

Defendant says the evidence of his possession of cocaine and drug paraphernalia was inadmissible proof of

other crimes and that its prejudicial effect outweighed its probative value.

Defendant argues that the questioned evidence was not relevant to, and was a crime independent of, the homicide prosecution. On the contrary, the evidence indicating that Defendant was under the influence of cocaine was proof directly related to and explanatory of the circumstances of the murders and relevant to Defendant's mental state during the commission of these offenses. That evidence meets the test prescribed in Rule 401, Federal Rules of Evidence adopted by this Court in *State v. Banks*, 564 S.W.2d 947, 949 (Tenn.1978). Considering the inexplicable brutality with which these crimes were committed it is more probable than not, that the murderer was under the influence of drugs or alcohol or both, and evidence that Defendant had access to both drugs and alcohol was relevant and probative of his guilt. *See State v. Zagorski*, 701 S.W.2d 808, 813 (Tenn.1985).

Defendant complains of the irrelevance of the introduction of a child's toy stuffed animal and a pair of children's shoes found at the crime scene. No objection was made at the time of the admission of those articles as part of the testimony of the investigating detective describing the crime scene. Nevertheless, defendant asks that we consider this issue on its merits. We have. We find the evidence irrelevant and harmless beyond a reasonable doubt.

All of the remaining issues raised by defendant involve alleged errors that occurred during the sentencing phase of the trial.

At sentencing the State presented only two witnesses, Mary Zvolanek, Charisse's mother and Detective Sammy Wilson of the Millington Police Department. Mrs. Zvolanek testified very briefly about how her grandson, Nicholas, cried for his mother and sister and could not understand what had happened. Detective Wilson was one of two detectives that conducted the investigation of these

crimes. He testified at the guilt phase of the trial and was recalled at the sentencing phase to identify a videotape that he had made of the crime scene. He did so and the tape was played for the jury, over objection.

Defendant presented the testimony of four witnesses at the sentencing phase of the trial, his mother and father, Bobbie Thomas, and Dr. John T. Hutson.

Bobbie Thomas testified that she joined Defendant's father's church and became acquainted with Defendant; that she had a troubled marriage, was abused by her husband and it had a bad effect upon her three children; that Defendant was a very caring person and the time and attention he had devoted to her children had "got them back to their old self." She said she did not drink or use drugs and neither did Defendant; that it was inconsistent with Defendant's character to have committed these crimes.

Dr. Hutson is a clinical psychologist, who specializes in criminal court evaluation work. He gave Defendant the Wechsler Adult Intelligence Scale (WAIS) revised version. Defendant's scores were Verbal IQ 78, Performance IQ 82, with a variance of plus or minus 3 on the Verbal and plus or minus 4 on the Performance. He testified that the theoretical norm is 100, that actual test results have moved the norm close to 110; that historically the mental retardation score was 75, but "retardation" is not commonly used anymore. He preferred mentally handicapped. He also gave Defendant the Minnesota Multiphasic Personality Inventory (MMPI). That test consists of 566 questions that tests a number of different things, that give insight into personality functioning, responses to stress and physical performance. Various "scales" measure lying or faking, hypochondria, depression, hysteria, psychopathic deviance, sexuality, paranoia, cyclothymia, schizophrenia and mania. The tests are graded by computer. Dr. Hutson testified that Defendant was in a normal range or near normal range, with

the exception of intelligence and schizophrenia. He said that Defendant "was actually lower intellectually than I had anticipated. And he is low enough that I consider it significant." He testified that Defendant scored above the normal—which is moving toward psychotic—but that in his opinion Defendant was not psychotic or schizophrenic—that that scale of the MMPI, "has a racial bias to it. Blacks tend to look higher on it when actually its very normal for them." The testing was performed in October, about three months after the murders. Dr. Hutson described Defendant as "somewhat naive" and one of the most polite individuals he had ever interviewed in jail.

Defendant's parents testified that Defendant had no prior criminal record, had never been arrested and had no history of alcohol or drug abuse; that he worked with his father as a painter, was good to children and a good son.

Defendant insists that testimony of Nicholas Christopher's grandmother regarding his reaction to the loss of his mother and sister, was inflammatory "victim impact" evidence in violation of *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987).

The evidence complained of consisted of Mrs. Zvolanek's answer to one question. The question and answer are as follows:

> Q. Ms. Zvolanek, how has the murder of Nicholas's mother and his sister affected him?
>
> A. He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He come to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell yes. He says, I'm worried bout my Lacie.

In *Booth v. Maryland, supra*, the Court said that "victim impact statements" provide two types of irrelevant

information that create a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner. The first type describes the personal characteristics of the victims and the emotional impact of the crimes on the family. The second type describes the family members opinions and characterizations of the crimes and the defendant. Mrs. Zvolanek's brief answer contains only a matter-of-fact statement that a four-year-old boy misses and cries for his mother and sister. (This case was tried approximately seven months after the crimes were committed). The VIS in *Booth* covered the full range of the two types of irrelevant information described above and was more extensive and inflammatory than the above quoted answer of Nicholas' grandmother. While technically irrelevant, that statement did not create a constitutionally unacceptable risk of an arbitrary imposition of the death penalty, and was harmless beyond a reasonable doubt.

Defendant also contends that comments were made in the State's closing argument that violate *Booth*. Since this case was tried (February 1988) the United States Supreme Court has extended its condemnation of victim impact evidence to comments by the prosecution, in final argument, on personal qualities of the victim, and reading a so-called religious tract, couched in sporting parlance, seeking God's help in playing the game of life as a good sport should, a possession of the victim. As in *Booth*, the majority found that the prosecution had focused upon considerations not relevant to Defendant's "personal responsibility and moral guilt." *South Carolina v. Gathers*, —— U.S. ——, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989).

Defendant's brief quotes from the transcript the portions of the State's closing argument said to violate the Eighth Amendment to the United States Constitution, as follows:

> But we do know that Nicholas was alive. And Nicholas was in the same room. Nicholas was still

conscious. His eyes were open. He responded to the paramedics. He was able to follow their directions. He was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and to his baby sister.

Is that heinous . . . (XVIII, 1576).

There is nothing you can do to ease the pain of any of the families involved in this case. There is nothing you can do to ease the pain of Bernice or Carl Payne, and that's a tragedy. There is nothing you can do basically to ease the pain of Mr. and Mrs. Zvolanek, and that's a tragedy. They will have to live with it the rest of their lives. There obviously is nothing you can do for Charisse or Lacie Jo. But there is something you can do for Nicholas.

Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict you will provide the answer. (XVIII, 1581)....

You saw the videotape this morning. You saw what Nicholas Christopher will carry in his mind forever. When you talk about cruel, when you talk about atrocious, and when you talk about heinous, that picture will always come into your mind, probably throughout the rest of your lives. . . . (XVIII, 1591).

. . . And there won't be anybody there—there won't be his mother there or Nicholas' mother there to kiss him at night. His mother will never kiss him goodnight or pat him as he goes off to bed, or hold him and sing him a lullaby. (XVIII, 1592-1593).

. . . Mr. Garts wants you to think about a good reputation, people who love the defendant and things about him. He doesn't want you to think about the

people who love Charisse Christopher, her mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for here every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why is it especially cruel, heinous, and atrocious, the burden that that child will carry forever. (XVIII, 1594-1595).

. . . Mr. Garts says but Pervis Payne has lived an exemplary life for twenty years. Well, what about Charisse, for twenty-eight years? What about Lacie Jo, for two years? They lived exemplary lives. But they are not here with us anymore. (XVIII, 1596-1597).

We are of the opinion that the prosecutor's argument is relevant to this defendant's personal responsibility and moral guilt. When a person deliberately picks a butcher knife out of a kitchen drawer and proceeds to stab to death a twenty-eight year old mother, her two and one-half year old daughter and her three and one-half year old son, in the same room, the physical and mental condition of the boy he left for dead is surely relevant in determining his "blameworthiness."

It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.

This case was tried more than a year before *Gathers* was released but *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) apparently commands that we apply *Gathers* retroactively. However, we are of the opinion that the argument did not violate either *Gathers* or *Booth*.

Finally, we are of the opinion that assuming the argument here violated the Eighth Amendment, as interpreted by the United States Supreme Court, we think it subject to harmless error analysis. *See State v. Alley*, 776 S.W.2d 506, 513 (Tenn.1989). The "personal responsibility", the "moral guilt" and the "blameworthiness" of the person who committed these crimes, was established by the proof at the guilt phase, to-wit, that inhuman brutality, without reason or explanation was heaped upon three innocent human beings. Once that person's identity was established by the jury's verdict, the death penalty was the only rational punishment available. Thus, the State's argument was harmless beyond a reasonable doubt.

This issue is without merit.

Defendant asserts that the trial judge erred in allowing the State, over objection, to show the jury, at the sentencing, a videotape of the crime scene.

Detective Wilson made a videotape, about ten minutes in length, and the State was permitted to show the jury the first two minutes, approximately, of that tape. The part shown was the scene in the kitchen where Charisse and Lacie's bodies were found, and had not been moved when the video was made. Nicholas, of course, had been taken to the hospital.

Defendant says the video was gruesome and graphic and was "unfairly prejudicial." Defendant asks this Court to apply the test in *State v. Banks*, 564 S.W.2d 947 (Tenn.1978) to photographs and videos offered at the sentencing stage. Acknowledging that the weighing process where, as here, the State relies upon the aggravating circumstance as heinous, atrocious, or cruel would be different than at the guilt phase—Defendant proposes that we weigh probative value versus prejudicial effect, allow "prejudicial evidence which is relevant" but exclude "unfairly prejudicial" evidence.

The State insists that the video was relevant to the aggravating circumstances, heinous, atrocious, or cruel because it depicts the number and severity of the wounds, the savagery of the attack and the desperate struggle of Charisse to escape the repeated stab wounds.

The video was relevant to the State's contention that the murder was heinous, atrocious or cruel, and its probative value on that issue outweighed any prejudicial effect. *See State v. Porterfield*, 746 S.W.2d 441 (Tenn. 1988) and *State v. Teague*, 645 S.W.2d 392 (Tenn.1983).

Defendant contends that the trial judge's instruction to the jurors that they should not "have any sympathy or prejudice or allow anything but the law and evidence to have any influence upon them in determining their verdict," violated his rights under the Eighth Amendment, United States Constitution.

We rejected this issue in *State v. Porterfield*, 746 S.W.2d 441, 450 (Tenn.1988) in reliance upon *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987). Jurors are repeatedly told in criminal trials, and were in this trial, that they are to decide the case on the "law and the evidence," without sympathy, prejudice, and similar distractions. The emphasis was not on "anti-sympathy" but on the necessity to key the focus on the law and the evidence. There is no merit to this issue.

Defendant contends the prosecution committed error in expressing the personal opinion that ". . . I could not agree with Tom Henderson more, if this isn't a case for death by electrocution, then I don't know what is . . . ."

It is a violation of the Code of Professional Responsibility, DR 7-106(C)(4) for lawyers engaged in trial to express their personal opinion about any issue involved in the justice of the cause they represent. This Court has repeatedly condemned such conduct. *See e.g. State v. Johnson*, 743 S.W.2d 154, 159 (Tenn.1987) and *State v. Hicks*, 618 S.W.2d 510, 516, 517 (Tenn.Crim.App.1981).

However, insofar as its effect upon Defendant's rights, it is ineffective, as well as unprofessional, and in this case was harmless beyond a reasonable doubt.

Defendant also complains that the same assistant district attorney committed an inflammatory act during closing argument at the sentencing hearing.

The argument that accompanied the act was as follows:

> Ladies and gentlemen of the jury, this is the last thing I am going to say to you. But I want you to think about this when you go back into your jury room. We have heard a lot about Charisse Christopher, Lacie Jo and Nicholas, and here they were as they appeared before Pervis Payne came into their lives. And this is what he did to them.
>
> Did they deserve it? Are you going to let it go unpunished.

As the prosecutor said, "And this is what he did to them," she approached Exhibit 24, a large diagram of Nicholas Christopher's body, and stabbed a hole through it with Exhibit 25, the butcher knife found between Charisse and Lacie's bodies. Defendant contends that the stabbing act was calculated to inflame the passions of the jury. We are of the opinion that it was an improper argument, an improper, unprofessional act and an improper use of exhibits. Whether it was "calculated" to inflame the jury or did in fact inflame the jury is debatable. The jury may also have regarded the action as improper. We find the prosecutor's action harmless beyond a reasonable doubt.

Defendant contends that the trial judge's instructions could have led the jury to believe that they were required to vote for the death penalty unless they unanimously agreed on a mitigating circumstance which outweighed the aggravating circumstances. Defendant relies on *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) in support of his contention that the instruc-

tion violated the Eighth Amendment, United States Constitution. We rejected this contention in *State v. Thompson*, 768 S.W.2d 239 (Tenn.1989).

Defendant contends that the trial judge should have instructed the jury that they must be persuaded beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that they must find beyond a reasonable doubt that the death penalty was appropriate in the present case. Defendant says the trial judge's instruction was inadequate in this case and his Eighth and Fourteenth Amendment rights were violated.

The trial judge instructed the jury that the burden of proof was on the State to prove any statutory aggravating circumstances beyond a reasonable doubt, and gave a definition of reasonable doubt. In *State v. Porterfield*, *supra*, the same charge was given and we rejected this same issue, advanced by Porterfield.

Defendant contends that the trial judge instructed the jury that *"the sentence shall be death."* Defendant is mistaken, no such charge was given. He has lifted a phrase out of context. We have held that this same charge does not make the death penalty mandatory, as erroneously contended by Defendant. *See e.g. State v. Wright*, 756 S.W.2d 669, 674 (Tenn.1988); *State v. Teague*, *supra*.

Defendant contends that the trial judge should have instructed the jury to presume that Defendant would actually serve a life sentence, if the jury verdict was life instead of the death penalty. We have rejected this identical contention in *State v. Melson*, 638 S.W.2d 342 (Tenn. 1982). The after-effect of a jury's deliberation is not a proper instruction for, or consideration, by the jury. *See Houston v. State*, 593 S.W.2d 267, 278 (Tenn. 1980).

Defendant contends the Tennessee death penalty statute is unconstitutional, acknowledging that we have repeatedly rejected the same issues he presents. We adhere to our previous opinion holding the statute constitutional.

Defendant contends that the Eighth and Fourteenth Amendments, United States Constitution are violated by Tenn. Code Ann. § 39-2-203(g), which states that if the jury determines that the aggravating circumstance or circumstances proved by the State beyond a reasonable doubt are *not outweighed* by any mitigating circumstances, the sentence *shall* be death.

We addressed this same argument in *State v. Thompson*, 768 S.W.2d 239, 251, 252 (Tenn.1989). We concluded that the statute did not violate the Eighth Amendment.

Defendant cites the recent case of *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir.1988) in which the Ninth Circuit Court of Appeals held the Arizona death penalty statute unconstitutional because it was said to place the burden on Defendant to prove the existence of mitigating circumstances substantial enough to warrant leniency. The Arizona statute differs from the Tennessee statute and we are content to adhere to our analysis and holding in *State v. Thompson, supra.* Likewise we are not persuaded that the legislature's revision of Tenn. Code Ann. § 39-2-203(g), (now Tenn. Code Ann. § 39-13-203(g)) requires that we depart from *Thompson.*

Pursuant to Tenn.Code Ann. § 39-13-205 we have reviewed the sentence of death and are of the opinion that it was neither excessive nor disproportionate to the penalty imposed in similar cases.

The conviction of murder in the first degree and the sentence of death will be carried out on the 18th day of July, 1990, unless stayed by appropriate authority.

SUPREME COURT OF THE UNITED STATES

No. 90-5721

PERVIS TYRONE PAYNE,
Petitioner

v.

TENNESSEE

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 2 presented by the petition.

In addition to the Question 2 presented by the petition, the parties are requested to brief and argue whether *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), should be overruled.

The petitioner's opening brief is to be served and filed with the Clerk on or before March 18, 1991. Respondent's brief is to be served and filed with the Clerk on or before April 8, 1991. The case is set for oral argument during the April session.

Justice Stevens, with whom Justice Marshall and Justice Blackmun join, dissenting: In my opinion, the Court's

decision to expedite the consideration of this case and to ask the parties to address whether we should overrule *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989), a question presented neither in the petition for certiorari nor in the response, is both unwise and unnecessary. Cf. *Patterson v. McLean Credit Union*, 485 U.S. 617, 622-623 (1988) (Stevens, J., dissenting). Moreover, the Court's decision to review the alleged *Booth* error in this case would be inappropriate in any event because the decision below rested alternatively on the ground that any *Booth* violation that might have occurred was harmless beyond a reasonable doubt. See *State v. Payne*, 791 S.W.2d 10, 19 (Tenn. 1990). Accordingly, I respectfully dissent.

February 19, 1991

As Amended